IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4816 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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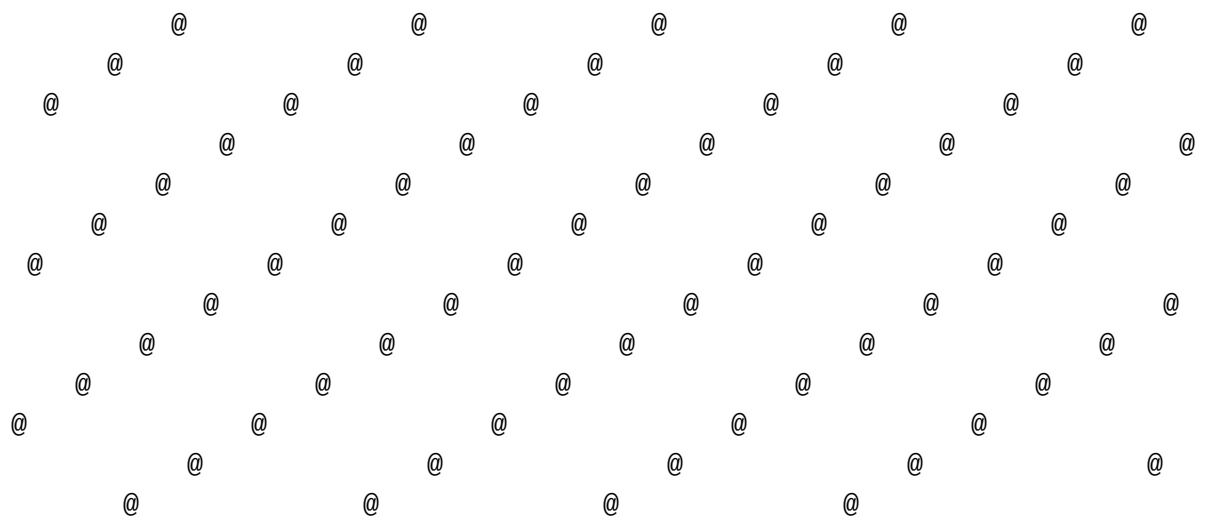
1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes



3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

KHUSHALBHAI JETHABHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

M/S THAKKAR ASSOC. for Petitioner

Mr.C.C.Bhalja, A.G.P. for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 03/12/98

ORAL JUDGEMENT

1. In this writ petition under Article 226 of the Constitution of India two prayers have been made, one in the nature of certiorari for quashing the detention order dated 4.4.1998 passed by the Commissioner of Police, Vadodara, under Section 3(2) of the Prevention of Anti-Social Activities Act, 1985 (for short "PASA Act") and secondly in the nature of writ of habeas Corpus for immediate release of the petitioner from illegal detention.

2. Brief facts are that from the report of the Sponsoring Authority and after consideration of two cases under the Indian penal Code registered against the petitioner and also from the statements of three witnesses whose addresses and identities have been kept secret the Detaining Authority came to conclusion that the petitioner is a dangerous person and his activities are prejudicial to maintenance of public order. Considering that the alternative remedies are ineffective to put immediate control over the activities of the petitioner that the impugned order of detention of the petitioner was passed. It is this order which is under challenge in this petition.

3. The impugned order has been challenged by the learned Counsel for the petitioner on three grounds.

4. The first ground is that the co-accused who was likewise detained under the PASA Act was enlarged by this Court vide order in Special Civil Application No.4817 of 1998, decided on 28.9.1998. Zerox copy of the said Judgment has been placed. This ground, to my mind, has no substance. The reason is that there is distinction between co-accused and co-detenu. A person is said to be co-accused who is involved in an offence and against whom F.I.R. is registered along with the main accused. Co-detenu is a person who is detained preventively by a single order disclosing identical grounds of detention. The zerox copy of the Judgment of Special Civil Application No.4817 of 1998 does not indicate anything that the petitioner in that case was a co-detenu along with petitioner of this case. Neither in the grounds of detention in this case there is mention that some other person was detained along with the petitioner. This plea was not taken in the writ petition. There is no material

on record to come to conclusion that the petitioner P.K.Parmar in Civil Application No.4817 of 1998 was a co-detenu along with the petitioner of this case. As such release of P.K.Parmar by this Court does not amount to automatic release of the petitioner before me.

5. The second contention has been that the representation sent by the sister of the petitioner was not at all considered by the State Government which has rendered detention order illegal. From Para : 2 of the Counter Affidavit of Shri J.R.Rajput, Under Secretary, Home Department, Government of Gujarat, it is clear that no representation dated 12.6.1998 alleged to have been sent by the Advocate of the detenu was received in the Home Department. Copy of this representation signed by the Advocate of detenu has not been filed as annexure to this writ petition. Consequently this Counter Affidavit has to be accepted that no representation dated 12.6.1998 was sent by the Advocate of the detenu.

It is further stated in Para : 2 of this Counter Affidavit that one representation dated 12.6.1998 was sent by the Sister of the detenu and it was addressed to the Chief Minister of Gujarat. On 15.6.1998 representation was forwarded to the Home Department. It was found on 15.6.1998 that the representation did not bear signature of the detenu. Consequently it was returned with communication dated 16.6.1998 to the sister of the detenu to resubmit it with signature of the detenu so as to enable the State Government to consider the representation. Thereafter no response was received from the sister of the detenu and as such there was no delay in consideration of representation. Thus, from this para it appears that the representation sent by the sister of the detenu was not considered by the State Government on technical ground. This stand of the State Government was argued by the learned Counsel for the petitioner to be contrary to the pronouncement of the Apex Court in Balchand Chorasia v/s. Union of India, reported in AIR 1978 SC 297. However, the facts in that case were different. The representation was sent by the Advocate of the detenu, under instruction of the detenu, whereas in this case representation was sent by the sister of the detenu. Inspite of this distinguishable feature if the representation is sent by the mother, wife, sister, brother or father of the detenu it should not be returned asking these persons to obtain signature of the detenu. These persons were not obliged to go on inquiring where the detenu was actually detained. Instances are not rare where after passing the initial detention order detenu are transferred and kept in other jails. Consequently if

not impossibility, it was really genuine difficulty for the sister of the petitioner to obtain signature of the petitioner on the representation. Whatever was the worth of representation it should have been considered by the State Government and it should not have been returned by the State Government asking the sister of the petitioner to obtain signature of the detenu and resubmit the same. This delay in considering the representation on untenable grounds has certainly rendered the detention order illegal so also the continued detention of the petitioner. Anology can be taken in this regard from the observation of the Apex Court in Balchand's case (supra) where the Apex Court emphasised that where liberty of citizen is proposed to be curtailed the representation sent on behalf of the petitioner should not be dealt with technically rather such representation should be dealt with liberlly and on merits. Consequently this itself is a ground for quashing the detention order.

6. Last ground is that the activities of the petitioner disclosed in the grounds of detention do not amount to disturbance of public order. In this connection two things have to be kept in view. The detaining Authority proposed to take action against the petitioner for two reasons. Firstly that he is a dangerous person and secondly that his activities are prejudicial for maintenance of public order.

9. A person is said to be dangerous person within the meaning of Section 2(c) of the PASA Act who habitually commits or attempts to commit or abets in commission of offences punishable under Chapter : XVI and XVII of the I.P.C. or under Chapter : V of the Arms Act. The word "habitual" and "habitually" under this section means repetition of criminal offences punishable under the aforesaid chapters of the Indian penal Code. In order to show that the petitioner is habitual in committing such offences two cases have been mentioned in the grounds of detention. One is offence punishable under Section 147, 148, 149 and 323 I.P.Code and the other is under Section 307 and 114 I.P.Code, besides offences punishable under Bombay Police Act which were clubbed with the aforesaid offences punishable under the Indian penal Code. Chapter : XVI of the I.P.Code begins from Section 299 and ends at Section 377. Chapter : XVII I.P.Code commences from Section 378 and ends at Section 462 I.P.Code. In view of this offences punishable under Sections 143, 147, 148, 149 and 294 are beyond the perview of these two chapters. Of course, Section 323 is within the sweep of Chapter : XVI I.P.Code. Section 307 is no doubt covered under Chapter

: XVI, but no repetition of commission of such offence under this section has been alleged against the petitioner. Even three witnesses did not say that the activities of the petitioner were intended to commission of offence punishable under Section 307 I.P.Code. At the most their statements can be said to be falling under Section 323 I.P.Code against the petitioner.

7. Brandishing of lethal weapons like Gupti etc. has been alleged in the grounds of detention. If the petitioner is habitually moving in public places with such weapons without licence there was no difficulty with the police to apprehend him and book him under Section 25 of the Arms Act, which is an offence punishable under Chapter : V of the Arms Act.

8. Thus, neither from the registered two cases nor from the incident narrated by the three witnesses it can be said that the petitioner is habitual in committing serious offences punishable under Chapters : XVI and XVII of the I.P.Code. If a person is habitual in committing offence punishable under Section 323 I.P.Code it would amount to curtailing his liberty by saying that he is dangerous person and by putting him under preventive detention. Dangerous person should be considered to be so in the context in which the Legislature intended by enacting Section 2(c) of the PASA Act. If a person gives a slap to another to commits an offence punishable under S. 323 I.P.C. but for that matter he should not be treated as dangerous person.

9. Thus, in my view, the petitioner cannot be said to be dangerous person. If the first ingredient fails then he could not be preventively detained simply because his activities were prejudicial to maintenance of public order. Even second condition, viz. activities being prejudicial to maintenance of public order is not fulfilled in the instant case. From the incident narrated by the three witnesses it can be said that commotion was created for a short while due to alleged activities of the petitioner on three occasions and thus at the most such activities could be said to have created law and order situation and not situation prejudicial to maintenance of public order. If the petitioner created law and order problem in evening or in broad day light he could be apprehended by the police under the general Law. That was not done. Preventive action against the petitioner under the aforesaid circumstances was, therefore, hardly justified. The detention order is, therefore, bad in law. The result therefore is that the petition is bound to succeed.

10. The writ petition is hereby allowed. The impugned order of detention dated 4.4.1998 is hereby quashed. The petitioner shall be released forthwith unless he is wanted in some other criminal case.

sd/-

Date : December 03, 1998 (D. C. Srivastava, J.)

sas